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7  
8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 BARBARA HERTZ,  
11  
12 Plaintiff,  
13  
14 vs.

15 HARTFORD LIFE AND ACCIDENT  
INSURANCE COMPANY and GROUP  
LONG TERM DISABILITY PLAN FOR  
EMPLOYEES OF INTUIT, INC.,  
16 Defendant.

CASE NO. 3:12-cv-00141-LRH-RAM

**DEFENDANT HARTFORD'S MOTION  
FOR SUMMARY JUDGMENT**

17  
18 Defendant THE HARTFORD LIFE AND ACCIDENT INSURANCE COMPANY  
19 ("Hartford"), hereby submits its Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 and  
20 Local Rule 56-1.  
21  
22  
23  
24  
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26  
27  
28

1 DATED this 27<sup>th</sup> day of June, 2013

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3  
4  
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13 I.

14 INTRODUCTION.

15 Plaintiff Barbara Hertz ("Hertz") seeks long term disability ("LTD") benefits from an  
16 ERISA plan sponsored by her former employer, Intuit, Inc (the "Plan"). Hertz claims she is  
17 unable to perform any type of work because of pain stemming from cervical and lumbar  
18 degenerative disc disease. For years, Hartford accepted Hertz's subjective complaints of pain and  
19 paid her LTD benefits. However, when Hartford conducted a review of Hertz's file, it became  
20 clear that she had exaggerated her symptoms. Hertz was observed functioning without any overt  
21 signs of pain and at a level she had denied she could function. Based on this new information,  
22 Hartford obtained an occupational analysis and identified occupations Hertz could perform in her  
23 current condition.

24 Hartford then terminated Hertz's LTD benefits based on its determination that Hertz's  
25 functional capacity was such that she could perform sedentary work. Hertz appealed Hartford's  
26 decision to terminate her benefits. As part of the appeals process Hartford obtained an  
27 independent medical records review by a board-certified neurologist. The independent reviewer  
28 determined that Hertz could perform sedentary work on a full-time basis. Accordingly, Hartford  
upheld its decision to terminate Hertz's LTD benefits.

Under the Plan, Hartford has discretion regarding claims decisions. Therefore, in

1 reviewing this case, the Court should employ an abuse of discretion standard of review. Hartford  
 2 anticipates that Hertz will argue that the Court should employ a heightened abuse of discretion  
 3 standard of review because of Hartford's alleged structural conflict of interest. (Hartford makes  
 4 claim decisions and also funds the benefits.) Whatever the level of deference this Court applies,  
 5 Hartford did not abuse its discretion when it denied Hertz's claim and its decision should be  
 6 upheld.

## 7 II.

### 8 STATEMENT OF FACTS<sup>1</sup>

#### 9 A. PERTINENT PLAN PROVISIONS REQUIRE HERTZ TO PROVIDE OBJECTIVE 10 PROOF THAT SHE WAS UNABLE TO PERFORM "ANY OCCUPATION."

11 1. Hertz participated in an ERISA governed group welfare benefit plan providing long  
 12 term disability benefits by virtue of her employment with Intuit, Inc. Hartford issued a group  
 13 policy of insurance to fund the Plan benefits. Hartford is the claim administrator. (AR 000001-  
 14 50.)<sup>2</sup>

15 2. The Plan provides LTD benefits equal to 66 2/3% of the participant's pre-disability  
 16 income if the participant meets the plan's definition of "Disability" and remains disabled through a  
 17 180-day elimination period. (AR 000008-10.) The Plan applies an "Own Occupation" definition  
 18 of "Disability" for the first 24 months. After that, the more stringent "Any Occupation" definition  
 19 of "Disability" applies. (AR 000020.) Plan participants are eligible to receive benefits if they  
 20 prove that they are "Disabled" and satisfy and all other Plan terms. (AR 000001-50.) Subject to  
 21 all other terms and conditions, the Plan defines "Disability" as follows:

22 Disability or Disabled means that during the Elimination Period and for the next  
 23 \_\_\_\_\_

24 <sup>1</sup> Hartford submits its Statement of Facts pursuant to LR 56-1. However, in an ERISA case such as this, where a  
 25 Court reviews an ERISA benefit decision for abuse of discretion, "a motion for summary judgment is merely the  
 26 conduit to bring the legal question before the district court and the **usual tests of summary judgment, such as  
 whether a genuine dispute of material fact exists, do not apply.**" *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942  
 (9th Cir. 1999). Instead, the Court will determine whether Hartford abused its discretion when it determined that  
 27 Hertz was no longer eligible for LTD benefits. *Id.*

28 <sup>2</sup> Hartford refers the Court to the Administrative Record. (Docs. ## 41-46, 48-48)

24 month(s) you are prevented by:

1. accidental bodily injury;
2. sickness;
3. mental illness;
4. substance abuse; or
5. pregnancy

from performing one or more of the Essential Duties of Your Occupation, and as a result your Current Monthly Earnings are no more than 80% of your Indexed Pre-disability Earnings. After that, you must be prevented from performing one or more of the Essential Duties of Any Occupation.

Your failure to pass a physical examination required to maintain a license to perform the duties of Your Occupation does not alone mean that you are disabled. (AR 000020.)

3. "Essential duty" is defined by the plan:

Essential Duty means a duty that:

1. is substantial, not incidental;
2. is fundamental or inherent to the occupation; and
3. can not be reasonably omitted or changed. (AR 000021)

4. "Any Occupation" is defined by the Plan:

Any Occupation means an occupation for which you are qualified by education, training or experience, and that has an earnings potential greater than an amount equal to the lesser of the product of your Indexed Pre-disability Earnings and the Benefit Percentage and the Maximum Monthly Benefit shown in the Schedule of Insurance. (AR 000020.)

5. The Plan expressly requires the participant to prove her claim. (AR 000011, 18-20.)

The Plan provides that benefits will end when a participant no longer provides proof that she meets the Plan's definition of "disabled." (AR 000011.) The Plan further provides that benefits must be reduced by "Other Income Benefits," including Social Security Disability Insurance ("SSDI") benefits, for which a claimant is required to apply. (AR 000012, 18-21.)

6. The Plan confers broad discretion on Hartford, the plan administrator, to interpret the plan:

**Who interprets policy terms and conditions?**

We [Hartford] have full discretion and authority to determine eligibility for benefits and to construe and interpret all terms and provisions of the Group Insurance Policy. AR 000019).

Hartford's claim determinations, including those in issue here, must be reviewed for an abuse of discretion. *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863 (9<sup>th</sup> Cir. 2008).<sup>3</sup>

**B. HERTZ STOPS WORKING AND SUBMITS A CLAIM FOR LTD BENEFITS;  
HARTFORD PAYS.**

7. In October 2006, Hertz was employed as Customer Service Manager at Intuit, Inc. (Am. Compl. ¶ 20, Doc. #10.) She stopped working on October 13, 2006 due to cervical and lumbar degenerative disc disease. (AR 000069.) She applied for LTD benefits through the Plan. (AR 000069.) Hartford approved Hertz's LTD benefits in March 2007. (AR 000051-53; *see also* Am. Compl. ¶ 28, Doc. #10.) Hertz continued to receive LTD benefits from Hartford through July 5, 2011, nearly five years. (Am. Compl. ¶ 37, Doc. #10.)

**C. HARTFORD REFERS HERTZ'S CLAIM TO ITS SPECIAL INVESTIGATION  
UNIT AND DETERMINES THAT SHE CAN PERFORM FULL-TIME  
SEDENTARY WORK.**

8. Hartford routinely evaluates on-going claims such as Hertz's. (AR 000071.) As part of this review process, Hertz filled out a claimant questionnaire in January 2010 wherein she indicated that she had problems walking, experienced cramping in both her legs, and was losing her ability to concentrate. (AR 000447.) On the questionnaire Hertz stated "I can't stand or sit for extended period of time. I cramp up & fall if I try to walk any distance. My pain levels make it so I have to take pain and seizure meds making activities hard & it's hard to concentrate." (AR 000447.) She also claimed "I get headaches daily that prevent me (sic) any length or concentration to work on computers. I have to change positions from sitting, walking to lying down (sic)." (AR 000447.)

9. As part of the review process, Hartford tried to reach Hertz at home by phone. (AR 000078.) Hertz's home telephone was answered "Jim's Doggie Diner." (AR 000078.) This

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<sup>3</sup> The manner in which a reviewing court applies the abuse of discretion standard depends on whether the administrator has a conflicting interest. *Montour v. Hartford Life & Accident Insurance Co.*, 588 F.3d 623, 629 (9<sup>th</sup> Cir. 2009).

1 raised a reasonable question about whether Hertz was working. Hertz's claim was referred to  
 2 Hartford's Special Investigation's Unit<sup>4</sup> for further evaluation. (AR 000078.)

3 10. Hartford's investigation revealed activities—especially her involvement in the  
 4 operation of Jim's Old Fashion Doggie Diner (the "Diner")—that called into question Hertz's  
 5 functional capacities (AR 000283.) For example, in addition to her "home" phone also being used  
 6 as the business line for the Diner, Hertz had posted a new menu for the Diner on her Facebook  
 7 account. (AR 000283, 315-316) The investigation revealed that Hertz was listed as the secretary  
 8 of the Fallon Lion's Club. (AR 000283.) She also had a tow truck registered in her name. (AR  
 9 000283.)

10 11. On their face, Hertz's activities appeared inconsistent with her claimed functional  
 11 capacity. Hartford therefore decided to conduct surveillance on Hertz in order to assess whether  
 12 her self-reported limitations appeared consistent with her actual functional capacity. (AR  
 13 000283.)

14 1. *Surveillance reveals Hertz engaging in activities inconsistent with her alleged*  
 15 *functional limitations.*

16 12. Hartford conducted surveillance on Hertz on four random days in December 2010.  
 17 (AR 000283.) Hertz was observed performing physical activities inconsistent with her self-  
 18 reported limitations.<sup>5</sup> (AR 000291-312.) Hertz reported to Hartford that she could not walk or sit  
 19 for any length of time. Yet Hertz was repeatedly observed driving, lifting and carrying various  
 20 items, and spending extended periods of time at the Diner. (AR 000291-312.)

21 13. Surveillance began December 7, 2010. (AR 000291-312). Hertz was away from  
 22 her residence for approximately 6 consecutive hours. During this time she did not show any  
 23 apparent functional limitations, or any overt signs of pain or discomfort. (AR 000292-97.)  
 24 During this time she:

25 \_\_\_\_\_  
 26 <sup>4</sup> This unit is now known as the "Claims Investigative Unit" or "CIU."

27 <sup>5</sup> Hartford respectfully requests that the Court view the surveillance video manually filed with the Court (Doc. ## 48-  
 28 49.)

- 1 • Drove approximately 24 minutes from her residence to Walmart. (AR 000295-96.)
- 2 • Shopped at Walmart where she pushed a shopping cart with both hands, carried
- 3 various items with both hands, loaded her vehicle with various items she had
- 4 purchased, and entered and exited her vehicle unassisted. (AR 000295-96.)
- 5 • Drove approximately 11 minutes from Walmart to the Diner where she remained
- 6 for approximately 5 hours, from 10:39 am until 3:29 pm. (The Diner's hours were
- 7 from 8:00 am until 2:00 pm.) (AR 000296-97.)
- 8 • Drove approximately 23 minutes to her mailbox where she exited and reentered her
- 9 vehicle without assistance. (AR 000296-97.)

10 14. Similarly, the next day, December 8, 2010, Hertz was away from her residence for  
 11 approximately 4 consecutive hours. She did not show any signs of functional limitations or any  
 12 overt signs of pain or discomfort. During this time she:

- 13 • Entered her vehicle unassisted and drove approximately 16 minutes to the Diner.  
 14 (AR 000298.)
- 15 • Exited her vehicle unassisted and carried a medium sized box into the Diner. (AR  
 16 000298.)
- 17 • Left the Diner with a female companion and drove approximately 13 minutes to an  
 18 unidentified residence. (AR 000299.)
- 19 • Carried several items without assistance into the residence. (AR 000299.)
- 20 • Drove from the residence back to the diner. (AR 000299.)

21 15. Surveillance was conducted again on December 22, 2010.<sup>6</sup> (AR 000303.) On this  
 22 date, Hertz was away from her residence for approximately 6.5 consecutive hours. She spent  
 23 nearly 6 hours at the Diner. (AR 000308.) She drove herself to the Diner without any assistance,  
 24 and she was observed walking up and down the stairs at the Diner without any limitations. (AR

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25  
 26 <sup>6</sup> Surveillance was also conducted on December 23, 2010. The investigator did not observe Hertz arriving or  
 27 departing from her residence. However, a sign on the Diner revealed that it would be closed from "December 23 –  
 28 January 3 for holidays."



1 000308.)

2 16. In light of the inconsistencies between Hertz's activities and her self reported  
3 limitations, Hartford attempted to reach Hertz by phone and in writing to schedule an interview at  
4 her residence. (AR 000283.) Hertz did not respond to Hartford. Hartford decided to attempt to  
5 interview Hertz at her residence. (AR 000284.)

6 2. *Hartford conducts an in-person interview with Hertz wherein she confirms she*  
7 *regularly engages in activities that are inconsistent with her self-reported*  
8 *limitations.*

9 17. On February 28, 2011, at approximately 8:00 am, the investigator arrived at Hertz's  
10 residence. (AR 000283.) Hertz was not home. (AR 000283.) The investigator went to the Diner.  
11 (AR 000284.) The Diner was closed. (AR 000284.) The investigator spoke with Jack McKay,  
12 the owner of a nearby business. (AR 000284.) Mr. McKay stated that the Diner had been closed  
13 for approximately one month for remodeling. (AR 000284.) Mr. McKay reported that when the  
14 Diner was open, Hertz spent 2-4 hours there almost every day. (AR 000284.)

15 18. Hertz apparently learned of the investigator's presence in Fallon. She called and  
16 left a number where she could be reached. (AR 000284.) The investigator called Hertz, and tried  
17 to arrange an in-home interview with her that day. (AR 000284.) Hertz did not want to be  
18 interviewed at her residence. (AR 000284.) She preferred that the investigator meet with her at a  
19 casino restaurant in Fernley, Nevada, in order to conduct the in-person interview. (AR 000285.)

20 19. At the in-person interview, Hertz told the investigator that she could not work in  
21 any occupation because of severe and chronic lower back and hip pain. (AR 000285.) However,  
22 Hertz admitted that she could independently and without the use of special equipment:

- 23 • walk slowly for 15 to 20 minutes;
- 24 • stand for 15 to 20 minutes;
- 25 • perform all of her own shopping;
- 26 • lift and carry items weighing between 5 to 10 pounds;
- 27 • push and pull things that require slight resistance;
- 28 • reach to her front, sides, and below her waist;



- 1 • walk up and down stairs and steps using a handrail;
- 2 • fully use her hands and fingers;
- 3 • read without restriction;
- 4 • drive short distances in her community;
- 5 • sit for approximately 20 to 30 minutes at a time; and
- 6 • dress and perform her own personal hygiene. (AR 000287-89.)

7 20. When asked about her involvement in the Diner, Hertz stated that she and her  
 8 husband had opened the Diner in January of 2010 and that it was currently closed for remodeling.  
 9 (AR 000288.) She denied actively working in the business. (AR 000288.) However, she stated  
 10 that because her husband had another job, when he could not be at the Diner she would supervise  
 11 the employees and “insure that all goes smoothly.” (AR 000288.) She estimated that her  
 12 activities at Diner equated to approximately 4 to 5 hours a week.<sup>7</sup> (AR 000288.)

13 21. The investigator also asked Hertz about her involvement in the Fallon’s Lions  
 14 Club. (AR 000288.) Hertz acknowledged that she was the secretary for the Fallon’s Lions Club.  
 15 (AR 000288.) As the secretary, her duties included taking notes and recording the minutes of the  
 16 club’s meetings. The meetings were approximately once a week for approximately 1 hour. (AR  
 17 000288.)

18 22. The investigator informed Hertz that surveillance that had been conducted. (AR  
 19 000289.) The activities captured on the surveillance videos were described to Hertz. (AR  
 20 000289.) She confirmed that she was the subject of the surveillance videos. (AR 000289.) Hertz  
 21 acknowledged that the activities observed during the surveillance would accurately memorialize  
 22 her levels of restriction. (AR 000289.)

23 23. Despite Hertz’s claims that she could only sit for 20 to 30 minutes at time, during  
 24 the in-person interview she stayed seated and did not exhibit any signs of pain. The in-person  
 25 interview lasted approximately 1 hour and 5 minutes. (AR 000285.)

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26  
 27 <sup>7</sup> During only two randomly chosen days of surveillance, Hertz spent approximately 7 hours at the Diner.  
 28

1  
2           3.     *Hertz primary care physician confirms that Hertz is able to work full time in a*  
3                 *sedentary occupation.*

4           24.    In light of the investigation that confirmed that Hartford was performing at a  
5 functional capacity much higher than she had claimed, Hartford's claims department obtained  
6 Hertz's updated medical records and reviewed them in detail. (AR 000077-81, 321, 390, 393.)  
7 Based on the medical records and the investigative material (including the surveillance and the in-  
8 person interview), Hartford determined that Hertz was capable of performing full-time sedentary  
9 work with certain restrictions. (AR 000077-81.)

10          25.    Hartford sent correspondence to Tracey Green, M.D., Hertz's primary care  
11 physician, inquiring whether Dr. Green agreed with Hartford's assessment that Hertz would be  
12 capable of working full-time in a sedentary occupation with occasional standing/walking, full use  
13 of her upper extremities, occasional lifting or carrying 0-10 pounds, and the ability to stand and  
14 move around as needed. (AR 000218.) In a letter dated June 6, 2011, **Dr. Green fully agreed**  
15 **with Hartford's assessment that Hertz should be able to work in a full-time in a sedentary**  
16 **occupation.**<sup>8</sup> (AR 000218.) (Emphasis added.)

17 **D.    AFTER ADDITIONAL INVESTIGATION HARTFORD TERMINATES HERTZ'S**  
18 **CLAIM.**

19          26.    After determining that based on her functional capacity Hertz should be able to  
20 work full-time in a sedentary occupation, Hartford obtained an employability analysis report  
21 ("EAR"). (AR 000238-69.) The EAR considered Hertz's education, work history, and physical  
22 limitations. The EAR identified several sedentary clerical and office management occupations  
23 suitable for Hertz. These occupations included office manager, accounting supervisor, billing-  
24 control clerk, and invoice-control clerk. (AR 000239.)

25          27.    After determining Hertz's functional capacity and identifying several sedentary  
26

27  
28                 <sup>8</sup> Dr. Green would later backtrack and state that Hertz was not able to perform any type of work.

1 occupations that she could perform, Hartford notified Hertz in a July 5, 2011 letter that it was  
 2 terminating her LTD benefits. (AR 000077-81.) Hartford explained that there was a wide  
 3 disparity between Hertz's reported and observed functionality, and that her own treating physician  
 4 Dr. Green agreed that she was capable of performing full-time work in a sedentary occupation.  
 5 (AR 000077-81.)

6 **E. HERTZ APPEALS HARTFORD'S DECISION TO TERMINATE HER BENEFITS.**

7 28. In a July 10, 2011 letter, Hertz notified Hartford that she intended to appeal  
 8 Hartford's decision to terminate her benefits. (AR 000085-87.)<sup>9</sup> Hertz contested Hartford's  
 9 reasons for terminating her benefits. (AR 00085-87.) First, Hertz disputed Hartford's reliance on  
 10 the surveillance that showed her "operating a motor vehicle, carrying items, and staying at Jim's  
 11 Doggie Diner for extended periods of time." (AR 00085.) Hertz admitted that she occasionally  
 12 drove short distances, but that her husband drove 95% of the time due to the effects of her  
 13 medications. (AR 00085.) Hertz also admitted that she was "able to lift some items" when  
 14 she went grocery shopping, but that she was "careful to stay within the 10 lb. limitations" she had.  
 15 (AR 00085.) Hertz stated that when she occasionally lifted heavier objects, she suffered "serious  
 16 side effects." (AR 00085.)

17 29. Second, Hertz attempted to minimize her involvement at the Diner. (AR 00085-  
 18 86.) Hertz claimed that the reason her "home" phone was answered as "Jim's Doggie Diner" was  
 19 because it was a rural mobile number that could be plugged into any electrical outlet for use, and  
 20 her husband had taken the "home phone" to the Diner to use. (AR 00085-86.) Hertz admitted,  
 21 however, that she would occasionally review the books because that was her "expertise" and she  
 22 "worked as a consultant for [her husband], so he could prepare the information correctly." (AR  
 23 00086.)

24 30. Third, Hertz admitted that she sat through the 1 hour and 5 minutes in-person  
 25 interview with the investigator. But she claimed that she experienced discomfort, and she had  
 26

27 <sup>9</sup> In a letter dated August 26, 2011, Hertz formally requested an appeal.  
 28

1 difficulty walking afterwards. (AR 00086.)

2 31. Fourth, Hertz stated that she was on narcotics and anti-seizure medicine. (AR  
3 00086.) She stated that she was hospitalized in April 2011, because of spasms and pain. (AR  
4 00086.) She was discharged on pain medications “because they cannot do much else for me.”  
5 (AR 00086.) She was also hospitalized in June 2011, when she abruptly stopped her pain  
6 medications because she lost her health insurance coverage. (AR 00086.) Hertz stated she was  
7 “working hard to improve her stamina for sitting and standing” and that she “[tried] to walk  
8 daily,” so she didn’t lose her flexibility. (AR 00086.)

9 32. Fifth, Hertz stated that there was no place within 55 miles that she could earn even  
10 close to 80% of her previous income. Because she could no longer drive long distances, working  
11 67 miles away in Reno was out of the question. (AR 00087.)

12 33. In a letter dated August 31, 2011, Hartford notified Hertz that her appeal was  
13 assigned to the Appeal Unit, a department completely separated from the Claims Department.  
14 (AR 00066.) Hartford explained that the Appeals Unit would independently investigate her claim.  
15 (AR 00066.)

16 **F. A BOARD CERTIFIED NEUROLOGIST CONDUCTS AN INDEPENDENT**  
17 **REVIEW OF HERTZ’S CLAIM AND DETERMINES THAT HERTZ IS ABLE TO**  
18 **PERFORM FULL-TIME SEDENTARY WORK.**

19 34. Hartford referred Hertz’s file for an independent medical review through MLS  
20 Group of Companies, Inc. (“MLS”). (AR 000153-162.) In order to determine Hertz’s functional  
21 capacity, board certified neurologist, Choon Rim, M.D., reviewed Hertz’s medical records,  
22 interviewed her treating physicians, and watched the surveillance videos. (AR 000109-115, 145-  
23 146, 156-164.)

24 1. *Dr. Rim’s reviews Hertz’s medical records and finds no objective evidence of*  
25 *impairment.*

26 35. Dr. Rim conducted a complete and detailed review of Hertz’s medical records  
27 dating back to 2007. (AR 000153-64.) Dr. Rim determined that although Hertz had *subjective*  
28 complaints of pain, there was no *objective* evidence of any current condition that would preclude

1 Hertz from working in a full-time sedentary occupation. (AR 000160-61.) For example, Dr. Rim  
2 noted from the records:

- 3 • On July 6, 2010, Hertz had good strength of the upper and lower extremities. She  
4 was referred to Dr. Quaglieri for an EMG due to intermittent cramping of her  
5 hands. The EMG revealed bilateral chronic C5-C6 changes of reinnervation and **no**  
6 **active cervical motor radiculopathy.** (AR 000156.)
- 7 • On September 20, 2010, Hertz stated that she **continued to be active on a daily**  
8 **basis** while taking two or three, at times four pain pills a day. (AR 000156.)
- 9 • On March 29, 2011, although Hertz was complaining of increasing pain in her  
10 lower legs, a **general physical examination was normal and a neuromuscular**  
11 **examination revealed no atrophy and no foot drop,** but significantly limited  
12 range of motion with ambulation and difficulty going from sitting to standing. (AR  
13 000156.)
- 14 • On June 6, 2011, Hertz's primary care physician, Tracy Green, M.D., agreed that  
15 Hertz had the ability to function to perform activities such as 40 hours per week,  
16 primarily sitting in nature, and lifting and limited carrying of to 0 to 10 pounds on  
17 an occasional basis. (AR 000156.)
- 18 • On July 29, 2011, Dr. Green determined that Hertz's **general physical**  
19 **examination was normal.** However, after Hertz's benefits were terminated, Dr.  
20 Green recanted and then opined that Hertz was unable to do any kind of work. (AR  
21 000156-57.)

22 2. *Dr. Rim's interviews with Hertz's treating physicians confirm that Hertz's*  
23 *complaints are subjective in nature and that there is no objective evidence of*  
24 *impairment.*

25 36. Dr. Rim engaged in a telephonic peer to peer consultation with Hertz's treating  
26 physician, neurosurgeon, Jay Morgan, M.D., on September 27, 2011. (AR 000157.) Dr. Morgan  
27 opined that Hertz's motivation to work was low and that her symptoms were subjective in nature.  
28 (AR 000157.) Dr. Morgan reported that since Hertz had been placed on disability she had

1 undergone multiple successful spinal surgeries, and that when he last examined her she showed no  
 2 weakness. (AR 000157-58.) Despite not evaluating Hertz for nearly a year, Dr. Morgan  
 3 inexplicably continued to opine that Hertz was unable to work, but suggested that a functional  
 4 capacity assessment may be warranted. (AR 000157-58.)

5 37. Next, on September 28, 2011, Dr. Rim engaged in a telephonic peer to peer  
 6 consultation with Hertz's primary care physician, Tracey Green, M.D. (AR 000158.) **Dr. Green**  
 7 **reported to Dr. Rim that from an internal medicine standpoint, Hertz did not have any**  
 8 **conditions that would preclude her from doing full-time sedentary work.** (AR 000158.) Dr.  
 9 Green confirmed that Hertz's main complaint was pain, and agreed that it was difficult to assess  
 10 the degree or severity of the pain without objective findings to indicate any underlying disease  
 11 process causing the pain. (AR 000158.) Nevertheless, Dr. Green opined that Hertz was unable to  
 12 work. (AR 000158.) When Dr. Rim told Dr. Green about the video surveillance of Hertz, Dr.  
 13 Green responded that perhaps Hertz had gotten worse since December and suggested that she may  
 14 need some further surgery.<sup>10</sup> (AR 000158.) In other words, Dr. Greene was suggesting that  
 15 Hertz's condition worsened between the time of the December 2010 surveillance, and Dr.  
 16 Greene's July 2011 examination of Hertz. But Hertz herself does not contend her condition  
 17 worsened during that time. The only thing that changed was that Hertz denied Hartford's appeal  
 18 which was based in part on Dr. Greene's previous determination that Hertz could work.

19 38. Charles E. Quaglieri, M.D., Hertz's treating neurologist, refused to speak with Dr.  
 20 Rim and requested that any communications with Dr. Rim be in writing. (AR 000158.) In a letter  
 21 dated October 5, 2011, Dr. Quaglieri reported that he had not seen Hertz since February 2010. (AR  
 22 000159.) Like Drs. Green and Morgan, Dr. Quaglieri acknowledged that Hertz had no definite  
 23 cervical and lumbar radiculopathy supported by any objective evidence. He also stated on  
 24 examination there was no evidence of radiculopathy, myelopathy or neuropathy. (AR 000159.)

25 \_\_\_\_\_  
 26 <sup>10</sup> In other words, Dr. Greene was suggesting that Hertz's condition worsened between the time of the December  
 27 2010 surveillance, and Dr. Greene's July 2011 examination of Hertz. But Hertz does not contend her condition  
 28 worsened during that time. The only thing that changed was that Hertz denied Hartford's appeal which was based in  
 part on Dr. Greene's previous determination that Hertz could work.



1 Dr. Quaglieri stated that he had no neurologic explanation for Hertz's pain. (AR 000159.)  
 2 However, since Dr. Quaglieri had not seen Hertz in approximately one and one-half years, he  
 3 would not opine whether she could work on a full-time basis. (AR 000159.)

4 39. Based on his review of the surveillance, the medical records, and his consultations  
 5 with Hertz's treating physicians, Dr. Rim concluded that there was no *objective* evidence of  
 6 impairment to preclude Hertz from sedentary employment on a full time basis with certain  
 7 restrictions as of July 1, 2011.<sup>11</sup> (AR 000160-61.) Dr. Rim noted that neuroradiological studies  
 8 including MRIs did not demonstrate any structural lesion in the cervical or lumbar spine to cause  
 9 complaints of pain; EMG studies did not reveal any myelopathy, radiculopathy or neuropathy;  
 10 neurological examinations did not show any significant anatomical lesions to cause neuropathy,  
 11 radiculopathy or myelopathy. (AR 000160-61.)

12 3. ***Dr. Rim's review of Hertz's updated medical records does not change his***  
 13 ***opinion.***

14 40. Following his initial report, Dr. Rim provided 2 addendums based on new medical  
 15 records that he received after Hertz sought treatment after she appealed the termination of her  
 16 benefits. (AR 000145-46.) In the first addendum, dated November 7, 2011, Dr. Rim opined that  
 17 according to Dr. Quaglieri, Hertz was not having any adverse reactions to her medications, nor  
 18 were her medications causing any cognitive impairment. (AR 000145-46.)

19 41. Dr. Rim provided an additional addendum on December 15, 2011, after he received  
 20 updated medical records from Drs. Morgan and Quaglieri. (AR 000109-12.) Dr. Rim's opinion  
 21 that Hertz could work full time in a sedentary occupation as of July 1, 2011 remained unchanged.  
 22 (AR 000111.) He noted that the updated medical records showed mild weakness of the left lower  
 23 extremity and possible peripheral neuropathy. (AR 000111.) However, neither of these  
 24

25 <sup>11</sup> The restrictions Dr. Rim suggested were: standing and walking up to 10 minutes at a time and 2 hours in total in an  
 26 8 hour day; unrestricted sitting (with intermittent breaks); frequent lifting and carrying up to 5 pounds and occasional  
 27 lifting and carrying up to 10 pounds, pushing and pulling up to 10 pounds occasionally; occasional restriction of  
 28 reaching above or below shoulder level; and five pounds frequently and 10 pounds occasionally, pushing and pulling  
 are 10 pounds occasionally, and unrestricted use of both upper extremities



1 conditions were confirmed by objective testing as a recent EMG and nerve conduction study were  
 2 both normal. (AR 000111.) Moreover, most of Hertz's symptoms continued to be "self-reported  
 3 pain." (AR 000111.) Thus, Dr. Rim's opinion that Hertz could engage in full-time work in a  
 4 sedentary occupation did not change. (AR 000111.)

5 **G. HARTFORD UPHOLDS ITS DECISION TO TERMINATE HERTZ'S LTD**  
 6 **BENEFITS.**

7 42. Based on its investigation, Hartford upheld its decision to terminate Hertz's LTD  
 8 benefits. (AR 000069.) Hartford notified Hertz of its decision by written correspondence dated  
 9 January 10, 2012. (AR 000069.) Hartford explained that in making its determination it had relied  
 10 on evidence including: Hertz's medical records; the opinions of Hertz's treating physicians; Dr.  
 11 Rim's report; the EAR; Hertz's self-reported and observed activities of daily living which  
 12 "provide[d] a picture of function in spite of any medical conditions." (AR 000072.) Hartford  
 13 specifically noted that while Hertz had some minimal objective findings of impairment on  
 14 physical/clinical testing, there was no objective evidence to support that Hertz had any functional  
 15 impairment that would preclude her from performing full-time sedentary work. (AR 000071.)

16 43. Hartford also explained to Hertz that it had considered any social security  
 17 administration ("SSA") determinations when it evaluated her appeal. (AR 000071.) Hartford  
 18 explained that while the SSA disability determination was one piece of evidence, it was not  
 19 conclusive because the standards governing SSDI benefits and LTD disability benefits under the  
 20 Plan differed. (AR 000071.) For instance, Hartford explained that unlike the requirement that the  
 21 SSA give special heed to the opinion of a claimant's treating physician, Hartford was not required  
 22 to do so. (AR 000071.) And while the SSA typically only conducted follow-up disability reviews  
 23 every 1-5 years, Hartford conducted such reviews at least yearly. (AR 000071-72.)

24 44. Hartford advised Hertz in the January 12, 2012 letter that she had exhausted her  
 25 administrative remedies under ERISA. She was entitled to bring a civil action under Section  
 26 502(a) of ERISA. (AR 000071.) Hence, this lawsuit.

27 **III.**

## LEGAL ARGUMENT

This case is governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001, et seq. Where a Court reviews an ERISA benefit decision for abuse of discretion, “a motion for summary judgment is merely the conduit to bring the legal question before the district court and the usual tests of summary judgment, such as whether a genuine dispute of material fact exists, do not apply.” *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999). Accordingly, rather than deciding whether Hertz’s ERISA claim should proceed to trial based on whether or not a genuine dispute over a material fact exists, this Court will here decide the merits of the case (that is, whether Hartford abused its discretion). For the reasons set forth below, Hartford did not abuse its discretion when it determined that Hertz was no longer entitled to long-term disability benefits. Therefore, the Court should enter judgment in favor of Hartford.

### A. HARTFORD'S CLAIM DECISION MUST BE REVIEWED FOR AN ABUSE OF DISCRETION.

Where an ERISA plan confers discretion on the plan administrator, the court must review the claim decision for an abuse of discretion. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006). In *Glenn*, the Court explained that in order to determine whether an administrator abused its discretion, a court should “take account of several different considerations of which a conflict of interest is one.” *Id.* The weight given to the conflict of interest will be less important, “perhaps to the vanishing point,” where . . . the claim administrator “take[s] active steps to reduce potential bias and to promote accuracy” by doing such things as separating claim examiners from the company's finances, evaluating employees without consideration of numbers or claims approved or denied, providing each claimant with an individual, independent review, and separating the appeals unit from those who make initial claim determinations. *Id.* at 117 (emphasis added); see also *Aluisi v. Unum Life Ins. Co. of America*, 407 Fed.Appx. 126 (9th Cir. 2010) (evidence that plan administrator with structural conflict implemented procedures to eliminate bias minimized the importance of the conflict).

1 Notably, in *Glenn*, the Court did not hold that a conflict is significant in every case. In  
 2 fact, the Supreme Court recognized that the district court did not rely exclusively, or even  
 3 predominantly, on the conflict to find that the claim administrator abused its discretion and noted  
 4 with approval that “[t]he [lower] court instead focused more heavily on other factors,” including  
 5 that the plan administrator supposedly failed to provide all the claimant’s medical records to its  
 6 physician reviewers. *Id.* at 106.

7 A number of federal courts have acknowledged Hartford’s lack of bias in its handling of  
 8 ERISA claims. For example, in *Fortune v. Group Long Term Disability Plan for Employees of*  
 9 *Keyspan Corp.*, 637 F.Supp.2d 132, 144 (E.D.N.Y. 2009), the court held that it “is satisfied that  
 10 Hartford has taken active steps to cure any structural conflict of interest. Hartford has effectively  
 11 ‘walled-off’ claims examiners from the company’s finance department by ensuring that an  
 12 examiner’s compensation is not determined by reference to his or her record in denying claims.  
 13 Hartford has also created a check against the arbitrary denial of claims and sought to promote  
 14 accuracy by maintaining a separate appeal unit that independently considers claims that were  
 15 denied upon initial review.” *See also Mugan v. Hartford Life Group Ins. Co.*, 2011 U.S. Dist.  
 16 LEXIS 6961, \*33 (S.D.N.Y. 2011) (S.D.N.Y. 2011) (stating “Hartford’s corporate structure and  
 17 policies **have abated the risk that Hartford’s conflict affected its decision.** . . . Hartford has  
 18 taken active steps to reduce structural biases and to promote accuracy in its claim administration  
 19 process.”) (emphasis added).

20 In this case, the structural conflict of interest is not substantial. Hartford takes broad  
 21 measures and great care to ensure that the financial performance of the company has no impact on  
 22 or relevance to the administrative determinations made by Hartford’s claims personnel. For  
 23 example:

- 24 • Hartford maintains a separate appeals unit for the consideration of claims that have  
 25 been denied by the claims department on its initial review;
- 26 • Each Appeals Specialist in Hartford’s appeals unit is charged with making an  
 27 independent assessment of the adverse claim decision based on relevant provisions  
 28

1 in the governing Plan/policy and upon all of the evidence contained in the claim  
2 file;

- 3 • During the Appeals Specialist's review of a denied claim on administrative appeal,  
4 the individual responsible for the appeal does not discuss the merits of the claim  
5 with the Claim or Investigative Analyst who made the initial benefits  
6 determination, or the Manager of LTD Claims or Claims Specialists, who approved  
7 the determination;
- 8 • In evaluating claims under employee benefit plans insured by Hartford, it is  
9 Hartford's practice and intention to review such claims fairly, without regard to the  
10 manner in which the plan is funded, and to consistently award benefits on claims  
11 that are entitled to payment pursuant to the provisions of the applicable benefit plan  
12 while consistently denying claims that are not entitled to such payments. Hartford  
13 administers claims in substantially the same manner whether it is doing so under a  
14 fully insured policy or pursuant to an administrative services only agreement;
- 15 • Hartford recognizes that awarding benefits on claims that are not eligible for  
16 payment under the applicable plan/policy does not benefit all of the persons insured  
17 under that plan/policy as a group. Instead, such payments could result in increased  
18 premiums and/or a reduction or elimination of benefits by the employer, which will  
19 ultimately work to the detriment of all participants and beneficiaries of a given  
20 plan;
- 21 • Hartford does not provide LTD Claims Analysts, Investigative Analysts, Claims  
22 Specialists, Managers of LTD Claims, or Appeals Specialists with incentives,  
23 remuneration, bonuses, awards, achievements, or other recognition based in whole  
24 or in part upon the denial or termination of claims. Hartford's claims decision-  
25 makers are paid fixed salaries and performance bonuses that are wholly unrelated to  
26 the number of claims paid or claims denied;
- 27 • Hartford's LTD Claims Analysts, Investigative Analysts, Claims Specialists,  
28 Managers of LTD Claims, and Appeals Specialists are evaluated on the quality and

1 accuracy of their claims decisions in accordance with the applicable plan/policy  
 2 documents. Hartford does not discourage its claim decision-makers from paying  
 3 legitimate claims;

- 4 • Hartford's LTD Claims Analysts, Investigative Analysts, Claims Specialists,  
 5 Managers of LTD Claims, and Appeals Specialists are not involved in Hartford's  
 6 financial decisions, including, but not limited to, any review or analysis of  
 7 Hartford's financial performance, or the financial performance or claims  
 8 experiences of any particular long-term disability plan insured by Hartford;
- 9 • Hartford's CIU claims department and appeals unit are completely separate  
 10 business units from the financial and underwriting departments;
- 11 • Neither CIU claims nor appeals personnel seek approval of Hartford financial  
 12 underwriters in connection with their decision-making on claims for disability  
 13 benefits;
- 14 • Hartford's financial and underwriting departments do not advise or influence CIU,  
 15 the claims department or the appeals unit with respect to the denial or termination  
 16 of a claimant's benefits. Indeed, these units are kept separate from each other; and
- 17 • The office of the Chief Financial Officer of Hartford, and its affiliate, subsidiary or  
 18 parent companies, do not have any involvement and do not participate in claims  
 19 decisions on disability benefits at any level. (See affidavit of Bruce Luddy attached  
 20 hereto as "**Exhibit A**" and incorporated herein by reference.)

21 Accordingly, the Court should not permit the "bare existence of a conflict" to undermine  
 22 the bargained-for discretion set forth in the plan. As cautioned by the Supreme Court in *Glenn*,  
 23 where a plan administrator takes active steps, such as those taken by Hartford (identified above) to  
 24 reduce potential bias and to produce accuracy, the weight given to the structural conflict of interest  
 25 will be to the vanishing point. *See Glenn*, 554 U.S. at 117.

26 The administrative record reflects that Hartford diligently investigated Hertz's claim and  
 27 appeal, and reasonably terminated her benefits based on substantial evidence in the record.

28 Therefore, the evidence in the administrative record does not warrant a modification of the

1 traditional abuse of discretion standard.

2 **B. HERTZ DID NOT PROVE THAT SHE WAS UNABLE TO PERFORM IN ANY**  
 3 **OCCUPATION.**

4 Under 29 U.S.C. §1132, a plan participant may bring a civil action “to recover benefits due  
 5 to the participant under the terms of his plan. . . .” 29 U.S.C. § 1132(a)(1)(B). A plaintiff suing  
 6 under this statute bears the burden of proving an entitlement to plan benefits. *Muniz v. Amec*  
 7 *Constr. Mgmt.*, 623 F.3d 1290, 1294 (9th Cir. 2010). “It is at all times a claimant's burden to  
 8 support and prove her claim.” *Dyer v. Metro. Life Ins. Co.*, 2008 U.S. Dist. LEXIS 82617, p. 22  
 9 (C.D. Cal. Aug. 18, 2008). In this case, the policy also places the burden on Hertz to provide proof  
 10 of her disability before it will pay her benefits. (HART-POLICY-00011, 18-20.)

11 In order to prove disability, a claimant must give objective proof that they are disabled, for  
 12 “the very concept of proof connotes objectivity.” *Maniatty v. UnumProvident Corp.*, 218  
 13 F.Supp.2d 500, 504 (S.D.N.Y. 2002) (where plan required “proof” but did not explicitly state that  
 14 proof must be “objective,” not abuse of discretion to require objective evidence); *see also Seleine*  
 15 *v. Fluor Corp. Long-Term Disability Plan*, 409 Fed.Appx. 99 (9th Cir. 2010) (upholding denial  
 16 where IME found that “significant subjective complaints” were “grossly disproportionate” to  
 17 objective findings). Even if the Plan does not explicitly require objective medical evidence of a  
 18 disability, a plan administrator may still require objective medical evidence. For example, in  
 19 *Walker v. Metropolitan Life Insurance Co.* 2010 WL 1946898 (C.D. Cal. 2010), the court held  
 20 that, because the administrator had discretion under the plan document, it further “had the  
 21 discretion to require objective evidence even if the Plan Document was silent as to the appropriate  
 22 criteria.” *Id.* at 13.<sup>12</sup>

23 A diagnosis, standing alone, does not establish that a claimant cannot work, and it is a  
 24

25 <sup>12</sup> *See also Cusson v. Liberty Life Assur. Co.*, 592 F.3d 215 (1st Cir. 2010) (not arbitrary to require objective evidence  
 26 of functional impairment); *McDonald v. Hartford Life Group Ins. Co.*, 2010 WL 183431 (5th Cir. 2010) (same);  
 27 *Speciale v. Blue Cross and Blue Shield Ass'n*, 538 F.3d 615, 622 (7th Cir. 2008) (same); *Williams v. Aetna Life Ins.*  
 28 *Co.*, 509 F.3d 317, 322 (7th Cir. 2007) (reasonable to require evidence of functional limitation that can be objectively  
 measured); *Jackson v. Prudential Ins. Co.*, 530 F.3d 696 (8th Cir. 2009) (determination that record lacked objective  
 evidence of cognitive impairment was neither arbitrary nor capricious).



1 proper exercise of discretion for a plan to find a claimant not “disabled,” where there is  
 2 insufficient evidence of functional impairment. *Pralutsky v. Metropolitan Life Ins. Co.*, 435 F.3d  
 3 833 (8th Cir. 2006) (reasonable to require objective evidence of functional impairment for  
 4 fibromyalgia, rather than accept statement of physician who merely repeated patient's subjective  
 5 complaints). Even if a claimed disability is based upon a condition that cannot itself be verified  
 6 by objective evidence, it is still the case that “the *physical limitations* imposed by the symptoms of  
 7 such illnesses *do* lend themselves to objective analysis.” *Boardman v. Prudential Ins. Co.*, 337  
 8 F.3d 9, 16 n.5 (1st Cir. 2003) (emphasis added). Moreover, when making a determination, a plan  
 9 administrator may consider the fact that there is a lack of objective evidence of functional  
 10 impairment. *See, e.g., Wiley v. Cedent Corp. Disability Plan*, 2010 WL 309670, \*9 (N.D. Cal.  
 11 2010).

12 Here, the Plan plainly confers discretion on the plan administrator, Hartford. Per the Plan  
 13 provisions, Hertz was required to prove by *objective* evidence that she was not able to perform  
 14 “Any Occupation.” Hartford did not dispute that Hertz had multiple medical conditions. But that  
 15 fact alone did not establish her eligibility for benefits under the Plan. Rather, Hertz was required  
 16 to prove that her medical conditions caused functional impairments sufficient to render her  
 17 “Disabled” under the plan. In short, Hertz was required to provide *objective* evidence to Hartford  
 18 that her purported disabling medical conditions prevented her from performing “Any Occupation.”

19 Hertz and her treating physicians were aware that they needed to provide Hartford  
 20 *objective* evidence of her inability to work in “Any Occupation.” But they did not. All of Hertz’s  
 21 treating physicians opined that Hertz’s complaints were *subjective* in nature. Given the absence of  
 22 objective evidence of functional limitations and restrictions, Hartford did not abuse its discretion  
 23 in declining to provide Hertz with continuing benefits.

24 In addition, Hartford *did* consider Hertz’s subjective complaints before terminating her  
 25 LTD benefits. In his review, Dr. Rim considered Hertz’s subjective complaints, including pain.  
 26 Dr. Rim noted that all of Hertz’s treating physicians relied on Hertz’s subjective complaints in  
 27 assessing her functionality. Based on the opinions of Hertz’s treating physicians, Dr. Rim opined  
 28 that Hertz had some restrictions. In effect, Hartford agreed with these restrictions when it



1 determined that Hertz could work full time in a sedentary occupation.

2 **C. IN ADDITION TO THE FACT THAT HERTZ DID NOT PROVE HER**  
 3 **ENTITLEMENT TO CONTINUING BENEFITS, THE EVIDENCE AS A WHOLE**  
 4 **SUPPORTS HARTFORD'S CLAIM DETERMINATION.**

5 1. *The surveillance video and report alone support a conclusion that the benefit*  
 6 *determination was not an abuse of discretion.*

7 Courts routinely uphold the use of surveillance videos to assess a claimant's level of  
 8 functionality. For example, in *DeBenedictis v. Hartford Life and Acc. Ins. Co.*, 701 F.Supp.2d  
 9 1113, 1127 (D.Ariz. 2010), a case where the plaintiff claimed he was wrongly denied benefits, the  
 10 plan administrator<sup>13</sup> conducted surveillance and observed the plaintiff engaging in activities that  
 11 he claimed he was incapable of performing including: "hopping" in and out of his truck, lifting  
 12 parcels, and walking with little to no difficulty. *Id.* In *DeBenedictis*, the plaintiff claimed that the  
 13 plan administrator over-relied on the surveillance video because it only showed him engaged in  
 14 activity for a few hours whereas there were over 40 hours of surveillance where he was engaged in  
 15 little to no activity. *Id.* at 1126. The court disagreed stating that the "observed activity was  
 16 inconsistent with plaintiff's self-reported limitations. Plaintiff claims that he was observed on a  
 17 'good day,' but given the dramatic difference between the limitations claimed and those observed,  
 18 the court is unconvinced that the level of activity observed was a rare occurrence. Defendant's  
 19 reliance on the surveillance was not improper or evidence of bias." *Id.* at 1127. *See also Aluisi v.*  
 20 *Unum Life Ins. Co. of America*, 407 Fed. Appx. 126 (9th Cir. 2010) (plan administrator's decision  
 21 was not an abuse of discretion where surveillance video provided objective evidence contradicting  
 22 claimant's assertion that he had unbearable pain).

23 Here, the surveillance was one piece of evidence that Hartford properly considered in  
 24 determining that Hertz did not meet the Plan's definition of disability. Indeed, it is compelling  
 25 evidence considering that: (a) Hartford had been paying benefits to Hertz for years largely based  
 26

27 <sup>13</sup> The plan administrator in this case was also Hartford.  
 28

1 on Hertz's subjective complaints and self-reported limitations for which it had little, if any,  
 2 objective evidence; (b) Hertz was observed spending extended periods of time at her "husband's  
 3 business" where she admittedly "filled in" when he was at his other job and performed book  
 4 keeping duties despite her claims that she had difficulty concentrating; (c) Hertz was observed  
 5 doing (with no apparent signs of pain or discomfort) activities that she had maintained for years  
 6 she was physically incapable of doing; (d) Hertz was not being routinely treated by her regular  
 7 neurologist or neurosurgeon for her allegedly debilitating symptoms—for example, she had not  
 8 seen her neurologist in almost 1.5 years; (e) her primary care physician opined that Hertz was  
 9 capable of sedentary work, but changed her opinion only after Hertz's benefits were denied.

10 Hartford properly relied on surveillance to evaluate Hertz's claim. In addition to the  
 11 surveillance, Hartford relied on other substantial evidence in determining that Hertz's benefits  
 12 should be terminated. In light of all the evidence, it was not an abuse of discretion for Hartford to  
 13 terminate Hertz's benefits.

14 **2. Dr. Rim's report supports that Hartford's benefit determination was not an abuse**  
 15 **of discretion.**

16 Plan administrators' use of and reliance upon the opinions of independent physicians has  
 17 been approved by many courts. *See, e.g. Watson v. Metropolitan Life Ins. Co., Inc.* 2012 WL  
 18 5464986, 1 (Dist. Ariz. 2012). Indeed, ERISA requires outside medical opinions in certain  
 19 circumstances. *See* 29 C.F.R. § 2560-503-1(h)(3)(iii), (4). Also, a plan administrator is *not*  
 20 required to defer to the opinion of the claimant's treating physician. *Black & Decker Disability*  
 21 *Plan v. Nord*, 538 U.S. 822, 834 (1989). A court cannot impose on a plan administrator a discrete  
 22 burden of explanation when they credit reliable evidence that conflicts with a treating physician's  
 23 evaluation. *Id.*

24 Furthermore, the fact that a plan administrator pays an independent third party vendor for  
 25 an independent physician review is not evidence showing an abuse of discretion, nor is it evidence  
 26 that a conflict of interest affected the benefit determination. *See Lee v. Kaiser Foundation Health*  
 27 *Plan Long Term Disability Plan*, 812 F.Supp.2d 1027, 1039 (N.D.Cal. 2011), *see also Magera v.*

1 *Lincoln Nat'l Life Ins. Co.*, 2009 WL 3837265, 2009 U.S. Dist. LEXIS 106440 (M.D.Pa. Nov. 16,  
 2 2009) (holding that where reviewers received compensation regardless of the conclusion they  
 3 reached in their reports, possibility for any potential conflict in the review process was lowered  
 4 and the fact that administrators paid for the review was not evidence of conflict because it was  
 5 common practice, and third party vendor was paid for reports regardless of opinion of independent  
 6 physician).

7  
 8 Dr. Rim's reports demonstrate a thorough consideration of the available information. Yet  
 9 without a shred of evidence, Hertz has repeatedly impugned the integrity of Hartford, MLS, and  
 10 Dr. Rim by repeatedly alleging that Hartford "purchased" a favorable records review.<sup>14</sup> (*See e.g.*  
 11 *Mtn. For Leave to Conduct Limited Discovery into the Nature, Extent, and Affect of Hartford's*  
 12 *Conflict of Interest, Doc. #16.*) Dr. Rim's review demonstrates that he carefully reviewed and  
 13 summarized Hertz's medical records and considered them in light of the surveillance video and  
 14 report, and his consultations with Hertz's treating providers. He then gave a reasoned opinion  
 15 where he explained why he disagreed with the conclusions of Hertz's treating physicians, why he  
 16 found no objective evidence that Hertz met the definition of disability under the Plan, and why he  
 17 believed Hertz could perform full-time sedentary work. Therefore, in making its benefits  
 18 determination, Hartford's reliance on Dr. Rim's report (in conjunction with the other evidence)  
 19 was not an abuse of discretion.

20 **3. *Hartford properly considered Hertz's award of Social Security benefits.***

21 In her Complaint, Hertz alleges that Hartford failed to consider her award of Social  
 22 Security benefits. (Am. Compl. ¶ 37, Doc. # 28.) Hartford anticipates that Hertz will argue that  
 23 the Social Security Administration's ("SSA") finding establishes that Hartford did an inadequate  
 24 investigation and wrongly denied her benefits. The argument is severely flawed because the  
 25 Supreme Court has expressly warned that Social Security concepts and guidelines should not be

26  
 27 <sup>14</sup> In light of the surveillance and other evidence, in this litigation Hartford could reasonably attack Hertz. Hartford  
 28 will only address the merits, however.

1 imported into ERISA cases because the two statutes serve different purposes through different  
 2 means. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832 (2003). In rejecting an  
 3 argument that, like the SSA, ERISA administrators should give deference to the opinion of the  
 4 claimant's treating physicians (over their own reviewers), the Supreme Court noted there were  
 5 "critical differences between the Social Security disability program and ERISA benefit plans." *Id.*

6 In contrast to the obligatory, nationwide Social Security program, nothing in  
 7 ERISA requires employers to establish employee benefits plans. Nor does ERISA  
 8 mandate what kind of benefits employers must provide if they choose to have  
 9 such a plan. *Id.* Rather, employers have large leeway to design disability and other  
 10 welfare plans as they see fit. In determining entitlement to Social Security  
 benefits, the adjudicator measures the claimant's condition against a uniform set of  
 federal criteria. The validity of a claim to benefits under an ERISA plan, on the  
 other hand, is likely to turn, in large part, on the interpretation of terms in the plan  
 at issue. *Id.* at 833 (emphasis added) (internal quotations and citations omitted).

11 Hertz cannot argue that the Hartford did not give appropriate weight to the SSA decision.  
 12 The appeal denial letter clearly states that Hartford considered the SSA award in determining  
 13 whether benefits were payable to Hertz under the terms of the Plan. However, Hertz's displeasure  
 14 with the outcome of her benefit claim does not establish that Hartford failed to consider the SSA  
 15 decision, particularly in light of the fact that Hartford specifically stated that the SSA award was  
 16 considered.

17 Moreover, the SSA's determination of disability cannot be compared to Hartford's  
 18 determination because Hertz has provided no evidence that the information before the SSA and  
 19 before Hartford were the same. Hartford's decision was made based on the administrative record  
 20 before it, i.e. the documents and other information submitted by Hertz and her medical providers.  
 21 The SSA decision was made based upon the records, information and testimony before it. There  
 22 is simply no way to determine whether the SSA considered the same information Hartford  
 23 reviewed. In fact, it likely was not the same information because the SSA determination was  
 24 made long before Hartford's decision to terminate Hertz's LTD benefits was made. Hartford's  
 25 decision to terminate Hertz's benefits was based on new evidence that was likely never considered  
 26 by the SSA. This new evidence included updated medical records that provided no objective  
 27 evidence of Hertz's subjective complaints of pain, and the surveillance video which showed Hertz  
 28 engaging in activities inconsistent with her alleged physical limitations. Thus, Hartford's

1 consideration and treatment of the SSA decision does not warrant a less deferential standard of  
 2 review or establish that Hartford's termination of Hertz's LTD benefits was an abuse of discretion.

3 IV.

4 CONCLUSION

5 Hartford's claim decision is entitled to deference and should be upheld because Hartford  
 6 conducted a thorough claim investigation and reasonably terminated Hertz's benefits based on  
 7 substantial evidence set forth in the administrative record including: (a) the surveillance video and  
 8 report which shows that Hertz engaged in activities inconsistent with her self-reported limitations;  
 9 (b) Dr. Rim's independent review of Hertz's medical records in which he found no objective  
 10 evidence of impairment that would preclude Hertz from performing sedentary work; (c) Dr. Rim's  
 11 peer to peer consultations with Hertz's treating physicians wherein they confirmed Hertz's  
 12 complaints were subjective in nature; and (d) Hertz's own report of her daily activities and  
 13 limitations. Accordingly, The Hartford did not abuse its discretion in denying Hertz's claim.  
 14 Hartford respectfully requests that the Court enter judgment in favor of Hartford.

15 DATED this <sup>27</sup> day of June, 2013

16 LEWIS BRISBOIS BISGAARD & SMITH LLP

17  
 18  
 19 By



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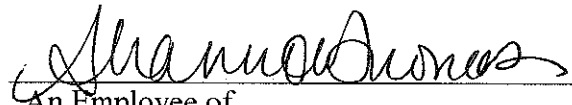
*Attorneys for Defendant Hartford Life and  
 Accident Insurance Company*

**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP and that on this 27<sup>th</sup> day of June, 2013, I did cause a true copy of **DEFENDANT HARTFORD'S MOTION FOR SUMMARY JUDGMENT** to be E-Filed and E-Served through the EFP, to the following:

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# **EXHIBIT A**



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6  
7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA  
9

10 BARBARA HERTZ,

11 Plaintiff,

12 vs.

13 HARTFORD LIFE AND ACCIDENT  
INSURANCE COMPANY and GROUP  
14 LONG TERM DISABILITY PLAN FOR  
EMPLOYEES OF INTUIT, INC.,

15 Defendant.  
16

DECLARATION

17  
18 1. I, Bruce Luddy, make this declaration based on personal knowledge and I  
19 am competent to testify about the matters of fact set forth below:

20 2. I am an adult resident in the State of Connecticut, where I am employed by  
21 Hartford Life and Accident Insurance Company ("Hartford") as Director of Litigation and  
22 Appeals.

23 3. Based on my position, I am familiar with Hartford's policies and procedures  
24 regarding evaluating claims under employee benefit plans insured by Hartford.

25 4. Hartford maintains a separate appeals unit for the consideration of claims  
26 that have been denied by the claims department on its initial review;

27 5. Each Appeals Specialist in Hartford's appeals unit is charged with making  
28

1 an independent assessment of the adverse claim decision based on relevant provisions  
2 in the governing Plan/policy and upon all of the evidence contained in the claim file;

3 6. During the Appeals Specialist's review of a denied claim on administrative  
4 appeal, the individual responsible for the appeal does not discuss the merits of the claim  
5 with the Investigative Specialist who made the initial benefits determination, or the Claim  
6 Specialist who approved the determination;

7 7. In evaluating claims under employee benefit plans insured by Hartford, it is  
8 Hartford's practice and intention to review such claims fairly, without regard to the manner  
9 in which the plan is funded, and to consistently award benefits on claims that are entitled  
10 to payment pursuant to the provisions of the applicable benefit plan while consistently  
11 denying claims that are not entitled to such payments. Hartford administers claims in  
12 substantially the same manner whether it is doing so under a fully insured policy or  
13 pursuant to an administrative services only agreement;

14 8. Hartford recognizes that awarding benefits on claims that are not eligible for  
15 payment under the applicable plan/policy does not benefit all of the persons insured  
16 under that plan/policy as a group. Instead, such payments could result in increased  
17 premiums and/or a reduction or elimination of benefits by the employer, which will  
18 ultimately work to the detriment of all participants and beneficiaries of a given plan;

19 9. Hartford does not provide Investigative Specialists, Claims Specialists, or  
20 Appeals Specialists with incentives, remuneration, bonuses, awards, achievements, or  
21 other recognition based in whole or in part upon the denial or termination of claims.  
22 Hartford's claims decision-makers are paid fixed salaries and performance bonuses that  
23 are wholly unrelated to the number of claims paid or claims denied;

24 10. Hartford's Investigative Specialists, Claims Specialists, and Appeals  
25 Specialists are evaluated on the quality and accuracy of their claims decisions in  
26 accordance with the applicable plan/policy documents. Hartford does not discourage its  
27 claim decision-makers from paying legitimate claims;

13. Neither CIU, claims, nor appeals personnel seek approval of Hartford financial underwriters in connection with their decision-making on claims for disability benefits;

15. The office of the Chief Financial Officer of Hartford, and its affiliate, subsidiary or parent companies, do not have any involvement and do not participate in claims decisions on disability benefits at any level.

Dated this 25th day of June, 2013

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